NO. 49263-6 II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PORT OF TACOMA, et al.,
Respondents

v.

SAVE TACOMA WATER, et al.
Appellants

RESPONDENT PORT OF TACOMA BRIEF

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I. STATEMENT OF THE CASE

In its Opening Brief, Appellants' Save Tacoma Water, et al ("STW") spends nearly 40 pages on a perhaps incidentally interesting description of the formation of "local powers."[1] But STW presents all of its recitation and "analysis" through rose-colored lenses that do not distinguish between hieratical levels of self-determined government, and by this critical omission, its analysis is wholly off point. Simply put, STW's local Initiatives fail because local initiative power is a grant from the state, local initiatives cannot exceed the scope of that state grant of authority, local initiatives cannot amend the United States or Washington State constitutions, local initiatives cannot create new inalienable and fundamental constitutional rights; local initiatives cannot interfere with administrative matters; and local initiatives cannot usurp authority delegated exclusively to the Tacoma City Council.

While the state and Tacoma municipal law confer the power of direct legislation on individuals, groups like STW may not, as they

[1] Examples include STW's citing to the Indiana state Constitution at p. 11, then linking its "relevance" to this case on an unspecific reference that the Washington Constitution was patterned after Oregon, and Oregon's after Indiana's; discussing the Mayflower Compact at page 14; 1760 "writs of assistance ' at p.16; *Marbury vs Madison* at p22; an extensive argument against application of *Dillions' Rule* of governance, which is not relevant to or raised in this case, and which Appellants STW themselves concede, to their apparent regret, remains the "law of the land per the United States Supreme Court," Appellants' *Opening Brief* at 25.

seek to do here, abuse that power through initiatives that exceed the local initiative power.[2]

The Respondents Port of Tacoma ("Port"), Economic Development Board for Tacoma-Pierce County ("EDB") and the Tacoma-Pierce County Chamber ("Chamber")[3] properly sought and the Trial Court properly issued a Declaratory Judgement that Tacoma Code Initiative 5 and Tacoma Charter Initiative 6 ("STW local Initiatives") are beyond the proper scope of the local initiative power, and are therefore invalid on their face. Below, the Trial Court agreed and properly issued injunctive relief to restrain and preclude the defective STW local Initiatives from being placed on any upcoming ballot.

The Trial Court's June 2016 rulings are precisely consistent with the then-freshly issued *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn. 2d 97 (Feb. 4, 2016) case, in which the Washington Supreme Court unanimously rejected a near-identical city of Spokane local initiative for all the same reasons. *Spokane Entrepreneurial* dictates the results of this appeal as well.

Under the Uniform Declaratory Judgment Act, the trial court

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[2] *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 51-52 (2012).

[3] The EDB and Chamber file their separate and consistent Brief on Appeal.

has the "power to declare rights, status and other legal relations." RCW 7.24.010. That power includes declaring the pre-election status of a local initiative as beyond the scope of the local initiative power and the right of the Auditor to refrain from placing invalid measures on the ballot.[4] Washington courts routinely exercise this power in pre-election local initiative challenges like this one. Indeed, at least three times since 2012, including as recently as February of 2016, Washington courts have found a local initiative exceeds the local initiative power.[5]

The STW local Initiatives make serious attacks on Respondents' and the City of Tacoma's rights and interests. The STW local Initiatives attempt to do all they cannot: repeal or amend the United States and Washington constitutions; create new inalienable and fundamental constitutional rights; usurp authority delegated exclusively to the Tacoma City Council; and interfere with

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[4] See, e.g., *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746 (1980) (affirming declaratory judgment for private plaintiffs declaring local initiative exceeded initiative power); *Ford v. Logan*, 79 Wn.2d 147, 151 (1971) (affirming declaratory judgment for private plaintiffs declaring local initiative exceeded initiative power); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App.427, 432-33 (2011) (upholding pre-election challenge to scope of initiative as exceeding initiative power and therefore invalid); *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386 (2004) (affirming declaratory judgment "striking [initiative] from the ballot").

[5] *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn. 2d 97 (Feb. 4, 2016), *See also City of Longview v. Wallin, 174 Wn. App. 763*, 301 P.3d 45 (Div. 2 2013), *cert denied*, 178 Wn.2d 1020 (2013); *Eyman v. McGehee*, 173 Wn. App. 684, 294 P.3d 847 (Div. 1 2013).

administrative matters. But the law protects from such abuse of the local initiative power. Under Washington law, the local initiative power is limited in scope and does not authorize using local legislation to amend the constitution, enact laws conflicting with superior law,[6] or otherwise intrude on administrative matters or matters delegated to the City's legislative authority. Local initiatives that exceed the scope of the initiative power of a city in any manner are invalid and should not be placed on the ballot.

Pre-election judicial challenges to the scope of the local initiative power do not intrude on the separation of powers as STW argues, and are both permissible and appropriate. Further, none of STW's arguments of: statutory construction[7], that Tacoma as charter city has a "right of self-government"[8], or claimed first amendment rights apply[9]. Last, STW's Initiatives are wholly invalid and cannot be severed, salvaged, or salvaged in part, as SW argues[10].

Specifically, STW's proposed local Initiatives are beyond the scope of local initiative power for one or more of the following reasons:

➢ The STW local Initiatives impermissibly exceed the local

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[6] The City of Tacoma's Charter echoes this requirement for local initiatives and provides that the "initiative shall be exercised ... in accordance with the general laws of the state." *Tacoma Charter* 2.19
[7] STW *Opening Brief* at 40.
[8] STW *Opening Brief* at 41.
[9] STW *Opening Brief* at 34-37.
[10] STW *Opening Brief* at 49.

initiative power by their attempted excessive scope.

- STW local Initiatives improperly attempt to amend or interpret constitutional law and the United States Supreme Court's ruling in *Citizens United v. Federal Election Commission,*[11] which held corporations have rights under the federal constitution.
- The STW local Initiatives exceed the local initiative power by impermissibly conflicting with federal and state law.
- The STW local Initiatives exceed the local initiative power by conflicting & interfering with state water law.
- The STW local Initiatives exceed the local initiative power by conflicting & interfering with federal & state water by creating a private right of action.
- The STW's local Initiatives are flatly inconsistent with the plain terms of Tacoma's Charter. Tacoma's Charter delegates the power to operate its water utility to the Tacoma Public Utility ("TPU") Board. *Tacoma Charter* 4.10.
- The STW local Initiatives interfere with powers delegated to local legislative bodies.
- The STW local Initiatives impermissibly interfere with city's operation of water utility.
- The STW local Initiatives impermissibly interfere with city zoning powers.
- The STW local Initiatives impermissibly intrude into administrative affairs.
- The STW local Initiatives would interfere with existing tacoma utility water operations & management.
- The STW local Initiatives improperly intrude on administrative

[11] 558 U.S. 310, 342-43, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010),

affairs: "development by ballot".

Respondents ask that this Appeals Court to affirm.

II. RESTATMENT OF FACTS

The City of Tacoma ("Tacoma") is a first class, charter city organized and operating under Title 35 RCW and the Tacoma City Charter.[12] Tacoma has operated a municipal water system for over one hundred years.[13] Under the Tacoma City Charter, Tacoma Water is a regional water utility established in the City's Department of Public Utilities[14]. Tacoma has a lengthy history of administering the supply of water to commercial, manufacturing, technological and industrial consumers.[15] Tacoma's Charter, Section 2.19, includes a citizen initiative process[16]. Appellant Save

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[12] "A first class city is a city with a population of 10,000 or more at the time of organization or reorganization that has adopted a charter". RCW 35.01.010, RCW 35.22.010. "The form of the organization and the manner and mode in which cities of the first class shall exercise the powers, functions and duties conferred upon them by law, with respect to their own government, shall be as provided in the charters thereof". RCW 35.22.020.CP 259. *Para. 2.*

[13] *Griffin v. Tacoma*, 49 Wn. 524, 526-7, 95 P. 1107 (1908) ("Under the terms of Ordinance No. 790 the electors of the city [of Tacoma] did hold an election in 1893 to determine, among other things, whether the city should purchase of the Tacoma Light and Water Company its water works and all sources of water supply then owned or operated by said company as part of its water system.."). and CP 259, *Declaration of Robert Mack at Para. 3.*

[14] CP 259, *Declaration of Robert Mack at Para. 3 and 4.*

[15] *Id.*

[16] CP 259-60,Charter Section 2.19 – Citizens of Tacoma may by initiative petition ask the voters to approve or reject ordinances or amendments to existing ordinances, subject to any limitation on topics in state law, by the following process:
(a) The petitioners shall file an Initiative Petition with the City Clerk.

Tacoma Water is a political action committee which along with its sponsors, registered as a Washington state Political Committee.[17]. STW claims to exist for the sole purpose of advocating Tacoma

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(b) The City Clerk shall forward the petition to the City Attorney within one (1) working day of receipt.
(c) Within ten (10) working days of receipt, the City Attorney shall review the petition and make contact with the petitioner as necessary, and if the petition is proper in terms of form and style, the City Attorney will write a concise, true, and impartial statement of the purpose of the measure, not to exceed the number of words as allowed under state law for local initiatives. The statement will be phrased in the form of a positive question.
(d) The City Attorney shall file this concise statement with the City Clerk as the official ballot title.
(e) The City Clerk shall assign an initiative number to the ballot title and notify the petitioner that the ballot title becomes final and signature gathering may begin in ten (10) working days if there is no judicial review. Notification of the ballot title shall be posted at City Hall and on the City's web page.
(f) Persons dissatisfied with the ballot title prepared by the City Attorney may seek judicial review by petitioning the Pierce County Superior Court within ten (10) working days of the notification of the ballot title having been posted as required under (e). The Court shall endeavor to promptly review the statements and render a decision as expeditiously as possible. The decision of the Court is final.
(g) Petitions must include the final, approved ballot title, initiative number, the full text of the ordinance, or amendment to existing ordinance, that the petitioners seek to refer to the voters, and all other text and warnings required by state law.
(h) Petitioners have one hundred and eighty (180) calendar days to collect signatures from registered voters.
(i) The number of valid signatures shall be equal to ten percent (10%) of the votes cast in the last election for the office of Mayor.
(j) The City Clerk shall forward the signatures to the County Auditor to be verified. Based on the Auditor's review, the City Clerk shall determine the validity of the petition. If the petition is validated, the City Council may enact or reject the Initiative, but shall not modify it. If it rejects the Initiative or within thirty (30) calendar days fails to take final action on it, the City Council shall submit the proposal to the people at the next Municipal or General Election that is not less than ninety (90) days after the date on which the signatures on the petition are validated.

[17] CP 378 and CP 382, STW Political Committee Registration.

Initiative No. 1 for the 2016 election year.[18] STW is entity listed as the sponsor of both the Tacoma Charter Initiative 5 and the Tacoma Code Initiative 6, the subject of this suit.[19] Jon and Jane Does 1-5 are the unknown officers and/or responsible leaders connected to the political committee Save Tacoma Water.[20]

STW's Code Initiative 6 seeks to have the City Council enact the changes to the Tacoma Municipal Code ("Code Initiative").[21] STW's Code Initiative 6 seek to impose a requirement that any land use proposal requiring water consumption of 1336 CCF (one million gallons) of water or more daily from Tacoma be submitted to a public vote prior to "the City" "providing water service" for such a project. [22] The Initiative would accomplish this by requiring developers seeking that water use to fund the "costs of the vote on the people" and only if

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[18] CP 378 and CP 382. STW claims in its PDC Registration to handle less than $5,000. ("No more than $5,000 will be raised or spent and no more than $500 in the aggregate will be accepted from any one contributor"). Id.

[19] Defendant Donna Walters is listed as the "sponsor" and "treasurer" of Save Tacoma Water. *Id.* CP 378 and CP383-4 and 385-6. Tacoma Charter Initiative 5 and the Tacoma Code Initiative 6.

[20] State law requires SAVE TACOMA WATER to register with the Public Disclosure Commission, and nominate "The names, addresses, and titles of its officers; or if it has no officers, the names, addresses, and titles of its responsible leaders...." RCW 42.17A.025(9)(c). Under Washington law, initiative drafters and sponsors are proper defendants in challenges to the scope of an initiative. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 269, 138 P.3d 943 (2006) ("Numerous cases illustrate that the sponsor of the proposed measure, the person or persons who engaged in the efforts and actions to draft an initiative or referendum, gather signatures, circulate the measure, and place the measure on the ballot, defends the measure it proposes prior to election.").

[21] CP 385-6.

[22] CP 385-6 at §A.

"a majority of voters approve the water utility service application and all other application requirements may the City provide the service."[23]

STW's Code Initiative expressly purports to elevate its proposed Charter amendment above state law, by pronouncing that "all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of the City of Tacoma only to the extent that they do not violate the rights or mandates of this Article.[24] STW's Code Initiative expressly purports to overrule and/or disavow the United States Constitution, along with "international, federal [and] state laws" that "interfere" with the proposed amendment,[25] and to curtail the jurisdiction of state and federal courts, and to eliminate certain rights of corporations, in conflict with the Washington and Federal Constitutions, as well as U.S. Supreme Court rulings. The Initiative deprives corporations of their right under the Washington state constitution to sue and defend against lawsuits in courts, "like natural persons." Wash. Const. art. I, § 12, and seeks to deprive the courts and other "government actors" from recognizing any "permit, license,

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[23] *Id.*
[24] CP 385-6 at §B.
[25] CP 385-6 at §C.

privilege, charter or other authorizations" that would violate the Initiative.[26] The Initiative also gives "any resident of the city" the right to enforce the Initiative[27]. STW apparently seeks all of these results through Tacoma Municipal Code provisions.

STW's Charter Initiative 5 seeks to require Tacoma to put to the voters amendments to the Tacoma Charter to require that any proposal which will use 1336 CCF (one million gallons) of water or more daily from Tacoma be submitted to a public vote prior to "the City" "providing water service" for such a project[28] ("Charter Initiative;" collectively the "STW local Initiatives"). The STW local Charter Initiative repeats all the same defective provisions of the Code local Initiative, which conflict with the US and Washington Constitutions and state and federal law[29].

Respondents filed their Complaint to dismiss with the Trial Court on June 6, 2016.[30] Soon thereafter, the City filed a Motion for

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[26] *Id.*
[27] CP 385-6 at *§ D*
[28] CP 383-4 at § 4.24 (A).
[29] Although STW only submitted signatures to the Tacoma City Clerk for Petitions pertaining to Code Initiative 6 for placement on the November 2016 ballot, STW issued a press release announcing their intention to continue to gather signatures for Charter Initiative No.5, with intention to submit that measure for the November 2017 ballot. CP 387-8. The two STW Initiatives are substantively identical. The Court should therefore rule on both Initiatives.
[30] CP 1.

Preliminary and Permanent Injunction.[31] Respondents also filed a Motion for Declaratory Judgment & Preliminary & Permanent Injunctive Relief.[32] Respondents argued that the Initiatives exceeded the proper scope of local initiative power and were invalid on their face.[33] Respondents also argued that the Initiatives attempted to repeal or amend the United States and Washington Constitutions; created new inalienable and fundamental constitutional rights; interfered with administrative matters; and usurped authority delegated exclusively to the Tacoma City Council.[34] In response, STW filed a Motion to Dismiss, alleging that the trial court lacked subject matter jurisdiction over the case, because, *inter alia*, the trial court lacked jurisdiction to conduct a pre-election review of initiatives.[35]

The Trial Court denied STW's Motion to Dismiss, finding that it had jurisdiction to decide the justiciable controversy and that the Respondents and City had standing to challenge the Initiatives.[36] The Trial Court also found that the Initiatives exceeded the scope of

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[31] CP at 175 – 193.
[32] CP at 318 – 64.
[33] CP at 319.
[34] CP at 321.
[35] CP at 595 – 606.
[36] CP at 674, 678; *also* Verbatim Report of Proceedings (July 1, 2016) at 53 – 54.

the local initiative power, were not severable, and were invalid.[37] The Trial Court granted Respondents and the City a temporary and permanent injunction prohibiting the Initiatives from appearing on the 2016 ballot or any future ballot.[38] STW appealed.

III. ANALYSIS

A. Judicial Pre-Election Review of Local Initiatives is Proper & Does Not Violate Separation of Powers

Pre-election judicial challenges to local initiatives are a routine exercise by Washington courts. There is nothing remarkable about the relief being that was granted in this case. To the contrary, Washington courts regularly exercise their power to enjoin a local initiative from appearing on ballots where, as here, the local initiative exceeds the scope of the local initiative power. [39]

Reviewing the substance of a local initiative to determine

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[37] CP at 677; VRP (July 1, 2016) at 54.

[38] CP at 688 – 89.

[39] *See Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016), (re-affirming that initiatives that purport to adjudicate water rights are contrary to state law, outside the scope of a city's authority and thus are beyond the scope of local initiative powers) and see *e.g., Am. Traffic Solutions.*, 163 Wn. App. at 433-34 (holding local initiative invalid as exceeding the scope of initiative power); See *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 749 (1980) (affirming court's grant trade association's request to enjoin initiative from appearing on the ballot); *Ruano v. Spellman*, 81 Wn.2d 820, 830 (1973) (affirming court's grant of private intervenors' request to enjoin initiative from appearing on ballot); *Ford v. Logan*, 79 Wn.2d 147, 151 (1971) (affirming court's grant of taxpayer's declaratory judgment action, enjoining initiative from appearing on ballot). See also *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 720 (1996) (attorney general should have "sought to enjoin [an initiative's] placement on the ballot" when attorney general believed it exceeded the initiative power).

whether it improperly exceeds the initiative power presents "exclusively a judicial function."[40] Courts engage in such pre-election review "to prevent public expense on measures that are not authorized by the constitution while still protecting the initiative power from review of an initiative's provisions for possible constitutional infirmities."[41]And a court may undertake pre-election review of a local initiative's subject matter "because postelection events will not further sharpen the issue (i.e., the subject of the proposed measure is either proper for direct legislation or not)."[42]

B. The Court Properly Declared the STW Local Initiatives Invalid Because They Exceed Local Initiative Power In Numerous Ways.

On near-identical grounds as the Washington Supreme Court found in *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016)[43], the STW local Initiatives exceed the local initiative power in numerous ways and should be found invalid. As Washington state law permits, under Tacoma's Charter, the "Citizens of Tacoma may by Initiative petition ask the voters to approve or reject ordinances or amendment to existing ordinances subject to any limitation on

[40] *Eyman v. McGehee*, 173 Wn. App. 684, 686-87 (2013).
[41] *Philadelphia II*, 128 Wn.2d at 718.
[42] *Coppernoll v. Reed*, 155 Wn.2d 290, 299 (2005).
[43] Copy attached **Attachment A.**

topics in state law."[44] "But '[t]he presence of broad initiative powers in a [city] charter does not ...justify unlimited application of that power."[45] Both the Washington State Constitution and the Tacoma Charter expressly limit the local initiative power to compliance with state law. Wash. Const. art. XI, § 10 (city "shall be permitted to frame a charter for its own government, consistent with and subject to the Constitution and laws of this state"); Tacoma Charter Section 2.18 (initiatives are expressly subject to "any limitations on topics in state law").

STW wrongly argues that Tacoma as a first class city is "self - governing" and that doubt concerning power should be resolved in favor of the first class city.[46] This simplistic approach wholly overlooks the legal hierarchy to which applies to local initiatives, as are STW's. Clear constitutional provisions and resulting case law prohibit STW's use of the local initiative process to enact a law that conflicts with federal or state law. "While the inhabitants of a municipality may enact legislation governing local affairs, they

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[44] CP 272: *Tacoma Charter §2.18*; RCW 35.22.200 (cities may grant the right of direct legislation in their charters).
[45] *Save Our State Park v. Bd. of Clallam Cty. Comm'rs*, 74 Wn. App. 637, 645, 875 P.2d 673 (June 24, 1994) (initiative power conferred in county home rule charter limited to compliance with state law).
[46] *STW Opening Brief at 41.*

cannot enact legislation which conflicts" with superior law.[47] "The fundamental proposition which underlies the powers of municipal corporations is the subordination of such [municipal] bodies to the supremacy" of federal and state law.[48] The City flatly does not have the authority to amend the United States or Washington State constitutions. Initiatives "must be within the authority of the jurisdiction passing the measure."[49]

Put simply, Tacoma cannot adopt a law by local initiatives that exceed the City's own legislative power, whether because the initiatives conflict with the federal or state constitutions, or because they conflict with other federal or state laws or limits. Here, the STW local Initiatives exceed the local initiative power in spades by (1) seeking to legislate in areas outside the local initiative power (amending constitutional law and conflicting with federal and state laws), (2) infringing on responsibilities delegated to the City Council,[50] and (3) intruding on administrative matters.

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[47] *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d 740, 746 (1980) at 747 (citing Wash. Const. art. XI, § 10).
[48] *Id.* (*quoting Philip A. Trautman*, 38 Wash. L. Rev. 743 (1963)).
[49] *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 720 (1996) at 719; see also *City of Port Angeles v. Our Water-Our Choice!*, 145 Wn. App. 869, 875 (2008) ("Local initiatives ... must be within the *local* legislative power."), *aff'd* 170 Wn.2d 1 (2010).
[50] See *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 746 (local initiatives may not conflict with state law); *Save Our State Park*, 74 Wn. App. at 644 (local initiatives may address only legislative, not administrative matters, and may not touch on matters delegated to the city council).

1. The STW Local Initiatives Impermissibly Exceed the Local Initiative Power By Their Attempted Excessive Scope

1.1 STW Local Initiatives Improperly Attempt to Amend or Interpret Constitutional Law.

A city does not have the authority to amend the United States or Washington State constitutions. Local initiatives "must be within the authority of the jurisdiction passing the measure."[51] The separation of powers doctrine vests authority to interpret federal and state constitutional law with the judiciary, not the legislature: "The construction of the meaning and scope of a constitutional provision is exclusively a judicial function," not a legislative one.[52] And a constitutional "[a]mendment ... is not a legislative act and thus is not within the initiative power reserved to the voters"; rather, constitutional amendments must follow constitutionally mandated procedures that do not permit amendment by direct legislation only.[53]

Whether the goals of the STW local Initiatives are laudable or not, the City of Tacoma simply lacks the power to alter, amend,

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[51] *Philadelphia II*, 128 Wn.2d at 719; see also *City of Port Angeles v. Our Water-Our Choice!*, 145 Wn. App. 869, 875 (2008) ("Local initiatives ... must be within the *local* legislative power."), *aff'd* 170 Wn.2d 1 (2010).
[52] *Wash. Off Hwy Vehicle Alliance NMA v. State*, 176 Wn.2d 18 225, 234 (2012).
[53] *Ford*, 79 Wn.2d at 156 (explaining right of direct legislation derives from different constitutional article than process for constitutional amendments, and latter requires bicameral agreement on proposed amendment and voter ratification).

reduce, or interpret federal or state constitutional provisions.[54] This principle applies with equal force to the STW local Initiatives' efforts to amend the federal and state constitutions to deprive corporations of their "personhood" rights under them, and of their rights under the First and Fifth Amendments, as emphatically upheld by the US Supreme Court.[55]

Sound policy reasons support this result. "The people in their legislative capacity are not ... superior to the written and fixed Constitution." [56] Thus, constitutional amendments must follow a constitutionally-mandated approval and ratification process. [57] Under this process, the "legislature can only propose, it cannot effectuate, amendments," unlike the legislature's role with "the mere enactment of laws." [58] This distinction in the process for constitutional amendments and legislative enactments protects

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[54] *Philadelphia II*, 128 Wn.2d at 720 (initiative seeking to establish a federal initiative process invalid because Washington lacks the power to enact federal law). *See also Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 749 (invalidating initiative that related "to matters upon which the City [had].no authority to legislate").

[55] See *Citizens United*, 558 U.S. at 343 (corporations have free speech rights of persons under First Amendment); *Pembina Consol. Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (corporations are persons for purposes of the Fourteenth Amendment); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 778, 14 (collecting U.S. Supreme Court cases affording corporations protections of constitutional guarantees under the First, Fourth, and Fourteenth Amendments, and explaining states may not deny corporations guarantees such as due process and equal protection); Wash. Const. art. Xll, § 5 (corporations have litigation rights of persons).

[56] *Ford*, 79 Wn.2d at 153.

[57] *Id.* at 155.

[58] *Id* at 155.

against the risk that "any given majority [could by direct action] remove all protections contained within constitutional frameworks."[59] For instance, under Washington's constitution, "these safeguards consist of the deliberative nature of a legislative assembly, the public scrutiny and debate made possible during the legislative process, the requirement of a two-thirds vote in each independent house of a bicameral body, and the tempering element of time."[60] "[T]hese safeguards against hasty or emotional action are of fundamental importance," and "are not lightly cast aside in an understandable zeal for the right of the people to act directly on matters of common legislation."[61] STW may not do by local initiative what the City cannot do by legislation.

1.2. The STW Local Initiatives Exceed the Local Initiative Power By Impermissibly Conflicting with Federal and State Law.

Nor may STW use the local initiative process to enact a law that conflicts with federal or state law. "While the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts" with superior law. [62] "The fundamental proposition which underlies the powers of municipal

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[59] *Id.*
[60] *Id.* at 156.
[61] *Id.* at 155-56 (holding home rule charters "cannot be repealed by initiative").
[62] *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747 (citing Wash. Const. art. XI, § 10).

corporations is the subordination of such [municipal] bodies to the supremacy" of federal and state law. *Id.*[63]

Here, the STW local Initiatives conflict with federal and state law by attempting to strip corporations of their "personhood" rights under federal and state law, including under the First and Fifth Amendments.[64] But federal law unquestionably guarantees such rights to corporations.[65] Similarly, Washington law treats corporations as "persons" for purposes of litigation rights, *see* Wash. State Const. art. XII, § 5 (corporations "shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons"), as well as for campaign and lobbying contributions and expenditures, see RCW 42.17A.005(35) ("person" for purposes of campaign contributions includes a "partnership, joint venture, public or private corporation, [or] association"); RCW 42.17A.005(31) ("lobbyist" includes "person").

A home-rule charter must be "consistent with and subject to the

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[63] (*quoting Philip A. Trautman*, 38 Wash. L. Rev. 743 (1963)).

[64] CP 383-4 *Charter Initiative at §4.24(C);* CP 385-6, *Code Initiative at §C.*

[65] *See, e.g., Citizens United*, 558 U.S. at 343 (First Amendment); *Sanders Cnty. Republican Cent. Committee v. Bullock*, 698 F.3d at 745 (same); *Pembina*, 125 U.S. at 189 (Fourteenth Amendment); *Bellotti*, 435 U.S. at 778 n.14 (collecting U.S. Supreme Court cases affording corporations protections of constitutional guarantees under the First, Fourth, and Fourteenth Amendments, and explaining states may not deny corporations guarantees such as due process and equal protection); Wash. State Const. art. XII, § 5 (corporations have litigation rights of persons).

Constitution and laws of this state." Wash. Const. art. XI, § 10. STW local Initiatives seek to deprive corporations of their right to sue and defendant against lawsuits related to the Initiative's provisions.[66] This conflicts with Wash. Const. art. XII,§ 5 (stating corporations "shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons").[67] By attempting to deprive non-profit and for-profit corporations of these rights, the STW local Initiatives conflict with federal and state law and thus, impermissibly exceeds the local initiative power.[68]

1.3. The STW Initiatives Exceed the Local Initiative Power by Conflicting & Interfering with State Water Law

The STW local Initiatives' water rights sections also conflicts with federal and state law by attempting to create "fundamental" rights to water protection, and by creating a private right of action for Tacoma residents to enforce those rights. [69] However, in Chapter 90 of the Revised Code of Washington, the State of Washington, which has "[t]he power ... to regulate and control the

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[66]CP 383-4 *Charter Initiative at §4.24(C);* CP 385-6, *Code Initiative at§ C.* (corporations that violate the Initiative will not "possess any other legal rights, powers, privileges, immunities or duties which would interfere with the enforcement of rights enumerated by this Charter");

[67] *State ex rel. Long v. McLeod,* 6 Wn. App. 848, 849 (1972) (same) (quoting Wash. Const. art. XII, §5).

[68] *Seattle Bldg. & Constr. Trades Council,* 94 Wn.2d at 747.

[69] CP 383-4 *Charter Initiative at §4.24(C);* CP 385-6, *Code Initiative at§ C.*

waters within it," has enacted a comprehensive scheme regulating water rights and uses.[70] Among other things, the Code gives the Department of Ecology the authority to "establish minimum water flows or levels for streams, lakes or other public waters," to regulate "underground waters," to "promulgate regulations implementing its water laws, to enforce such laws", and "to develop and implement ... a comprehensive state water resources program."[71]

In addition, Washington's Growth Management Act, RCW 36.70A et seq., requires that local legislative bodies "plan their growth, protect the environment, protect the property rights of individuals, and designate and protect 'critical areas.'" [72] The Act defines "development regulations" as "controls placed on development or land use activities by a county or city, including, but not limited to ... critical areas." [73]And it defines "critical areas" as including "wetlands, areas that recharge aquifers used for potable water, fish and wildlife habitat conservation areas, areas that are

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[70] RCW 90.03.010.
[71] See RCW 90.22.020; RCW 90.48.030, . RCW 90.48.035, RCW 90.48.037, . RCW 90.48.140; RCW 90.54.040.
[72] *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 169 (2006) (citing RCW 36.70A.020, .060; WAC 365-190-040); see also *Yes for Seattle,* 122 Wn. App. at 388. (GMA requires local legislative bodies to "develop comprehensive growth plans and development regulations to meet the comprehensive goals").
[73] *Yes for Seattle*, 122 Wn. App. at 388 n.1 (quoting RCW 36.70A.030(7)).

frequently flooded, and areas that are geologically hazardous." [74] Further, TPU has a legal obligation under state laws[75] to serve water and power demand in its service territories, and to acquire supplies and develop facilities (if necessary) to do so.

In 2016, the Washington Supreme Court in *Spokane Entrepreneurial Ctr.* unanimously re-affirmed that initiatives that purport to adjudicate water rights are also beyond the scope of local initiative powers:

> The second provision would give the Spokane River the legal right to "exist and flourish," including the rights to sustainable recharge, sufficient flows to support native fish, and [14] clean water. CP at 40. It would also give Spokane residents the right to access and use water in the city, as well as the right to enforce the Spokane River's new rights. Id. **The trial court ruled that this provision was outside of the scope of the local initiative power because it conflicted with state law, which already determines the water rights for the Spokane River.** The trial court noted that this provision was particularly problematic because it dealt with an aquifer that is actually located in Idaho, which is outside of the city's authority. The trial court also ruled that this provision was administrative in nature because it would deal with how an existing regulatory scheme is implemented. We affirm. **This broad provision is directly contrary to the water rights system established by the State and is outside the scope of the city's authority.[76]**

Thus, federal and state law comprehensively governs and regulates

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[74] *1000 Friends of Wash.*, 159 Wn.2d at 169 (citing RCW 36.70A.030(5)).
[75] (RCW 80.28. 110, RCW 80.04.010, RCW 80.04.380, and RCW 80.04.385)
[76] *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016).

water protection. The STW local Initiatives fail by conflicting an interfering with those state laws.

1.4 The STW Initiatives Exceed the Local Initiative Power by Conflicting & Interfering with Federal & State Water by Creating A Private Right Of Action.

Further, the STW local Initiatives' water rights sections create a private right of action, "foundational" rights for residents that do not exist under federal or state law which "any resident" can enforce. [77]The STW Initiatives' water rights section thus exceed the City's authority because it attempts to confer a private right of action on Tacoma residents to enforce rights that purportedly extend beyond the City of Tacoma's boundaries.[78] Under the local STW Initiatives, a Tacoma resident could sue the City of Tacoma or another organization or individual that seeks to use the threshold amount of water, regardless whether the offending conduct affects Pierce County, Black Diamond, City of Fife or any other area outside Tacoma city limits which Tacoma supplies water.[79] Yet the City of Tacoma cannot enact laws regulating the conduct or rights of

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[77] CP 383-4 *Charter Initiative at §4.24 B&D;* CP 385-6, *Code Initiative at§ 4.24 B&D.*
[78] *Id.*
[79] CP 259. *Dec of Robert Mack at Para 6.*

residents, citizens, or property of outside city limits.[80] The STW local Initiatives may not obtain by direct legislation what the City could not by its legislative powers.[81]

STW argues that the people of Tacoma can (or should be able to) protect their water supply from "state laws that threaten to prevent people from democratically deciding the future of their water supply" via the local Initiatives.[82] This STW language is only slightly more constrained than the wording of the Initiatives themselves, which attempt to create "Limitations on Government Infringement of the People's Inviolate Right of Sustainable Water Protections", "fundamental" rights to water protection, and a private right of action for Tacoma residents to enforce those rights.[83] The referred to "state law threats" are exactly that: state law, with which STW's local Initiatives impermissibly conflict. STW's argument is defective for all the many reasons noted above.

As a result, the water rights sections of each irreconcilably

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[80] *See* Wash. Const. art. XI, § 11 ("Any county, city, town or township may make and enforce ***within its limits*** all such local police, sanitary and other regulations as are not in conflict with general laws." (emphasis added)); *City of Spokane v. Coon*, 3 Wn.2d 243, 346 (1940) ("Under art. XI, § 1 1, of our state constitution, cities of the first class enjoy the same policy power within their borders as does the state itself." (emphasis added)).

[81] *See Philadelphia II*, 128 Wn.2d at 719.

[82] STW *Opening Brief* 46-47.

[83] See CP 385-6, *Code Initiative at § A, B &* C and CP 383-4, *Charter Initiative at §4.24 A, B & C.*

conflicts with federal and state law, and the Trial Court properly invalidated them. [84]That STW, like the Clean Water Act and Washington's water laws, has the goal of conserving water makes no difference-"[a] state law is pre-empted if it interferes with the methods by which the federal statute was designed to reach" the common goal.[85]

To the extent the water rights sections' grant of a private right of action and of fundamental rights of water protection to Tacoma residents' conflicts with Washington water statutes or the Growth Management Act, the entire sections fail. "Any county, city, town, or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Wash. Const. art. Xl, § 11 (emphasis added). "[A] local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits."[86] "A

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[84] See, e.g., *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987) (Clean Water Act preempted state nuisance law to the extent the law sought to impose liability on an out-of-state point source because it interfered with the Act's method of eliminating water pollution); *Parkland Light & Water Co. v. Tacoma-Pierce Cnty.*, 151 Wn.2d at 433**Error! Bookmark not defined.** (invalidating board resolution that irreconcilably conflicted with statutory authority granted to water districts); *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747 (initiatives may not conflict with state law); *Yes for Seattle*, 122 Wn. App. at 388 (affirming invalidation of initiative that conflicted with GMA).

[85] *Ouellette*, 479 U.S. at 494.

[86] *Parkland Light & Water Co. v. Tacoma-Pierce Cnty. Bd. of Health*, 151 Wn.2d 428, 433 (2004)(invalidating board resolution that irreconcilably conflicted with

local regulation that conflicts with state law fails in its entirety."[87] The City cannot, through the initiative power, enact legislation conflicting with the State's water utility or protection laws.

1.5 STW's Claim That Initiatives "Do Not Conflict" With State Law Is Disingenuous.

The sole example STW cites in its Opening Brief to attempt to explain away any conflict with state law is RCW 43.20260, the state law which establishes the duty of a municipal water supplier, as Tacoma Water Department is, to provide retail water service within its retail service area, including to industrial users.[88] STW offhandedly dismisses any conflict based on wholly unsupported speculation that Tacoma may not have sufficient water supply in the future.[89] STW fails to reconcile or refute the numerous other ways the STW local Initiative conflict with state and federal laws.[90] STW also ignores that the STW Initiatives' water development/ zoning by ballot sections require approval by majority vote "by the people of the City of Tacoma" for certain water uses.[91] These sections further provide the people's vote is "binding and not

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statutory authority granted to water districts) (citing *HJS Dev., Inc. v. Pierce Cnty. ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 482 (2003)).

[87] *Id* at 434.

[88] STW *Opening Brief* at 45.

[89] STW *Opening Brief* at 45.

[90] See Section B 1.2 – B. 1.4 herein, pages 18-23.

[91] CP 383-4, *Charter Initiative at §4.24(A)s and CP 385-6, Code Initiative at §A.*

advisory".[92] This language is directly contrary to Tacoma state law duty to provide water to all users in its service area without a vote.

2. The STW Local Initiatives Interfere with Powers Delegated to Local Legislative Bodies:

2.1 STW Initiatives Impermissibly Interfere with City's Operation of Water Utility

For a matter to be subject to petition and initiative, the legislative power sought to be exercised must be expressly delegated by the legislature to "the city" and not to the "legislative body" or "legislature" of the city. "An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself."[93] Therefore, for an issue to qualify for the citizen initiative process, it must (1) be expressly delegated (2) by the legislature (3) to "the city" and not the governing body of the city. Washington State law strictly construes "the city" as the corporate entity, and not the "legislative body" of the city. So, any authority granted to the legislative body of the city and not to the city itself falls outside the scope of citizen initiatives.

The intent of STW's Initiatives is to thwart the legislative

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[92] *Id.*

[93] *Am. Traffic Sols., Inc. v. City of Bellingham*, 163 Wn. App. 427, 433, 260 P.3d 245 (Div. 1, 2011), *review denied* 173 Wn.2d 1029.

purpose of "classifying customers served or service furnished" announced in RCW 35.92.010[94]. Water customer typing fails the three prong criteria above. RCW 35.92.010 applies to classifying water service customers. That statute, in relevant part, directs that action expressly to the legislative body:

> In classifying customers served or service furnished, the **city or town governing body** may in its discretion consider any or all of the following factors: [factors omitted].

Emphasized. STW's Initiatives' attempt to classify utility customers, thus delves into an expressly legislative matter and exceeds the scope of initiative powers.

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[94] RCW 35.92.010: "A city or town may construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate waterworks, including fire hydrants as an integral utility service incorporated within general rates, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution, and price thereof: PROVIDED, That the rates charged must be uniform for the same class of customers or service. Such waterworks may include facilities for the generation of electricity as a by-product and such electricity may be used by the city or town or sold to an entity authorized by law to distribute electricity. Such electricity is a by-product when the electrical generation is subordinate to the primary purpose of water supply.

In classifying customers served or service furnished, the city or town governing body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; location of the various customers within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the water furnished; the time of its use; the achievement of water conservation goals and the discouragement of wasteful water use practices; capital contributions made to the system including, but not limited to, assessments; and any other matters which present a reasonable difference as a ground for distinction. No rate shall be charged that is less than the cost of the water and service to the class of customers served."

Further, Washington's legislature vests the city council only with the authority to levy a reasonable and equitable connection charge. "Cities and towns are authorized to charge property owners seeking to connect to the water or sewerage system of the city or town as a condition to granting the right to so connect, in addition to the cost of such connection, such reasonable connection charge as the legislative body of the city or town shall determine proper in order that such property owners shall bear their equitable share of the cost of such system."[95] "RCW 35.92.025 authorizes municipalities to require property owners pay a fee to the city or town in order to connect to its water or sewage system. The statute allows the city or town to set the fee so that all system users pay their equitable share of the cost of such system".[96]

RCW 35.92.025 vests the authority to set the conditions of connecting to the water in the legislative body. RCW 35.92.025 does not authorize the municipality to conduct a public vote incidental to the connection, since RCW 35.92.025 vests the authority to set the connection conditions in the City's legislative body and not the voters. This Appeals Court should uphold the

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[95] RCW 35.92.025.
[96] *Landmark Dev., Inc. v. City of Roy*, 138 Wash. 2d 561, 569, 980 P.2d 1234 (1999).

invalidity of the local Initiatives because setting water connection conditions such as contingent on a public vote falls outside the scope of citizen initiative, because that power is vested in the legislative body.

2.2 The STW Local Initiatives Impermissibly Interfere with City Zoning Powers.

The Trial Court properly enjoined the STW local Initiatives from appearing on the ballot because the requirement for a vote for certain water use applications is a backdoor attempt to zone, and as such interferes with powers delegated to the Tacoma City Council. "An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself." [97]

First, "zoning ordinances and regulations are beyond the power of initiative or referendum in Washington because the power and responsibility to implement zoning was given to the legislative bodies of municipalities, not to the municipality as a whole."[98] Specifically, "Washington's general law grants and limits zoning powers to legislative bodies of charter cities as well as code cities"-

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[97] *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 51 (2012) (quoting *City of Sequim v. Malkasian*, 157 Wn.2d 251 , 261 (2006)). "'[A] grant of power to the city's' legislative authority or legislative body 'means exclusively the mayor and city council and not the electorate.'" *Id.* (quoting *Malkasian*, 157 Wn.2d at 265).

[98] *1000 Friends of Wash v. McFarland*, 159 Wn.2d 165, 174 (2007).

in particular, "to the city council."[99] The Washington Supreme Court has explained the policy reasons behind granting zoning power to municipal legislative bodies, such as city councils, but not to municipal entities themselves (i.e., the City):

> Amendments to the zoning code or rezone decisions require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social, and physical characteristics of the community .... In a referendum election, the voters may not have an adequate opportunity to read the environmental impact statement or any other relevant information concerning the proposed land-use changes.[100]

Consistent with these principles, Washington courts have repeatedly held invalid initiatives or referenda that seek to enact zoning ordinances or regulations, or that seek to amend zoning ordinances or regulations.[101]

Here, the STW Initiatives' zoning sections requires approval by majority vote "by the people of the City of Tacoma" for certain water uses[102]. These sections further provide the people's vote is "binding

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[99] *Lince v. City of Bremerton*, 25 Wn. App. 309, 312 (1980).
[100] *Leonard v. Bothell*, 87 Wn.2d 847, 843 (1976).
[101] *See, e.g., id.* at 853 (referendum challenging rezoning decision invalid because legislature granted zoning power to city council, not the corporate entity of the city); *Lince*, 25 Wn. App. at 312-13 (initiative to amend city zoning ordinance invalid because Washington law delegates zoning power to the city Council); *Save Our State Park v. Bd. of Clallam Cnty. Comm'rs*, 74 Wn. App. 637, 647 (1994) (initiative to repeal a zone from a county zoning code invalid because legislature granted zoning power to county's legislative authority, not to the county as an entity).
[102] CP 383-4, *Charter Initiative at §4.24(A)s and CP 385-6, Code Initiative at §A.*

and not advisory".[103] STW ignores that STW Initiatives' water development/zoning by ballot sections are defective because these sections thwart the legislative purpose of "classifying [water] customers served or service furnished" announced in RCW 35.92.010. [104]. Any authority granted to the legislative body of the city and not to the city itself falls outside the proper scope of citizen initiatives.[105] Because Washington law delegates zoning power to

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[103] *Id.*

[104] 35.92.010: "A city or town may construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate waterworks, including fire hydrants as an integral utility service incorporated within general rates, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution, and price thereof: PROVIDED, That the rates charged must be uniform for the same class of customers or service. Such waterworks may include facilities for the generation of electricity as a by-product and such electricity may be used by the city or town or sold to an entity authorized by law to distribute electricity. Such electricity is a by-product when the electrical generation is subordinate to the primary purpose of water supply. In classifying customers served or service furnished, the city or town governing body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; location of the various customers within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the water furnished; the time of its use; the achievement of water conservation goals and the discouragement of wasteful water use practices; capital contributions made to the system including, but not limited to, assessments; and any other matters which present a reasonable difference as a ground for distinction. No rate shall be charged that is less than the cost of the water and service to the class of customers served."

[105] *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016), ("This broad provision is directly contrary to the water rights system established by the State and is outside the scope of the city's authority.") "An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself." *Am. Traffic Sols., Inc. v. City of Bellingham*, 163 Wn. App. 427, 433, 260 P.3d 245 (Div. 1, 2011), *review denied* 173 Wn.2d 1029.

the City Council, not the City, the STW local Initiatives' zoning sections exceed the scope of the local initiative power.

Second, through the Growth Management Act, Chapter 36.70A RCW ("GMA"), Washington law likewise delegates to city councils and county legislative bodies the authority to develop comprehensive growth plans, which affect water drawn from aquifers. The GMA only authorizes city councils or boards, or county legislative bodies—not cities or counties themselves—to adopt and administer comprehensive growth plans.[106] GMA requires local legislative bodies to establish comprehensive plans and development regulations "to plan their growth, protect the environment, protect the property rights of individuals, and designate and protect "critical areas,'" which include recharge aquifers and fish and wildlife habitat conservation area.[107]

Consistent with this statewide mandate and delegation to local legislative bodies, the Tacoma Municipal Code (TMC) contains an entire chapter on "Critical Area Preservation," (TMC Chapter 13.11)[108] and a section on "Aquifer Recharge Areas" (TMC

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[106] RCW 35.63.110; RCW 6.70A.210(2).
[107] *1000 Friends of Wash.*, 159 Wn.2d at 169 (citing RCW 36.70A.020; RCW 36.70A.030(5)).
[108] CP 389-430.

13.11.800)[109] which classifies aquifers to the extent that they are an essential source of drinking water and which requires development in aquifer recharge area to be in accordance with "other local, state and federal regulation".[110] In addition, the Tacoma City Council developed a GMA-compliant comprehensive plan, "One Tacoma", which addresses Watershed Health (Chapter 4) of which one goal is to:

> Ensure that all Tacoman's have access to clean air and water, can experience nature in their daily lives and benefit from development that is designed to lessen the impacts of natural hazards and environmental contamination and degradation, now and in the future and "water quality". [111]

Despite the GMA's delegation to local legislative bodies, and despite the City Council's Comprehensive Plan, the STW Initiatives give Tacoma residents "inherent, inalienable right of local community self-government", and recognizes that "clean fresh water is essential to livability and happiness" and that City of Tacoma has a "fundamental duty" to maintain "sustainable provisions of water for the people" which any resident of Tacoma may enforce.[112] Under the Initiatives, then, Tacoma residents could

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[109] CP 422
[110] CP 422, TMC at 13.11.810c and 13.11.820.
[111] GOAL EN–3, CP 380 and CP 431-435, excerpt from Tacoma Comprehensive Plan.
[112] CP 383-4, *Charter Initiative at §4.24 B & D; CP 385-6, Code Initiative at § B & D.*

seek to amend or change the comprehensive plans or development regulations that the City Council has adopted under the GMA. But the Washington Supreme Court has stated "[t]he GMA is a clear example of legislation that creates public policy to be implemented in large part at the local level, by representatives more attuned to the individual needs, wants, and characteristics of their areas."[113]

STW misses the mark when it interprets Plaintiffs and City's reference to Comprehensive Plan as solely an issue of state law conflict[114]. Instead, this is another way the STW local Initiatives improperly delve into authority granted to the legislative body of the city and not to the city itself, and thus falls outside the proper scope of citizen initiatives[115]. The state Growth Management Act, Chapter 36.70A RCW ("GMA") delegates to city councils and county legislative bodies the authority to develop comprehensive plans. The GMA authorizes only city councils or boards, or county legislative bodies—not cities or counties themselves—to adopt and

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[113] *1000 Friends of Wash.*, 159 Wn.2d at 174; *see also id* at 181 ("allowing referenda is structurally inconsistent with [the GMA's] mandate").

[114] *STW Opening Brief* at 46.

[115] "An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself." *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 51 (2012) (quoting *City of Sequim v. Malkasian*, 157 Wn.2d 251 , 261 (2006)). "'[A] grant of power to the city's' legislative authority or legislative body 'means exclusively the mayor and city council and not the electorate.'" *Id.* (quoting *Malkasian*, 157 Wn.2d at 265).

administer comprehensive growth plans.[116] Relevant here, Tacoma's Comprehensive Plan "commit[s] the City to provide public water service concurrent with development, including when 'development' involves serving large water users."[117] STW Initiative sections which interfere with that City Council adopted commitment within the Comprehensive Plan to provide water strays into legislative areas; in doing so the STW local Initiatives are outside proper local initiative scope.

Because the legislature granted the power to enact ordinances falling within the GMA's scope to the legislative bodies of cities and counties, "the enactment of [such ordinances] cannot be accomplished by initiative."[118] Cases in which Courts prohibit use of local Initiative powers in zoning matters include the following:

- *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016), (affirming that initiatives that require any proposed zoning changes involving large developments to be approved by voters in the neighborhood rights dealt with administrative matters and was thus outside the scope of the initiative power).

- In *Leonard v. Bothell*, the Washington Supreme Court held that the Legislature, pursuant to RCW 35A et seq., had vested the power to adopt and modify a zoning code with the city council. Because the Legislature granted that power to the city council

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[116] RCW 35.63.110; RCW 6.70A.210(2).
[117] CP 178-9, 184-6.
[118] *City of Seattle v. Yes for Seattle,* 122 Wn. App. at 393; *see also 1000 Friends of Wash.*, 159 Wn.2d at 174, 181.

and not the "corporate entity", referendum rights were necessarily "precluded". 6 87 Wn.2d at 853. The Supreme Court, therefore, struck down a proposed referendum challenging the decision to rezone certain property. *Save Our State Park v. Bd. of Clallam Cty. Comm'rs*, 74 Wn. App. 637, 645, 875 P.2d 673 (June 24, 1994).

- In *Lince v. Bremerton*, Division 2 reached a similar conclusion in a case involving a proposed initiative to amend a city zoning ordinance. The Division II Appeals Court held there that the Legislature had granted the zoning power to the legislative body of the city, the city council, and not to the City of Bremerton. In reaching that decision, the Court rejected the argument that Bremerton was chartered under the state constitution, and therefore, was subject to different rules than Bothell, a "code city". Division 2 noted in *Lince* that "Washington's general law grants and limits the zoning power to the legislative body of charter cities as well as code cities". 25 Wn. App. at 312. Citing RCW 35.63.110 and RCW 58.17.070, the Appeals Court further observed that both zoning and platting power were delegated to the legislative body and, therefore, initiative was not permitted in those areas. Finally, the Court cited a California case for the proposition that "the initiative law and the zoning law are hopelessly inconsistent and in conflict as to the manner of the preparation and adoption of a zoning ordinance". 25 Wn. App. at 313 (quoting *Hurst v. Burlingame*, 207 Cal. 134, 141, 277 P. 308, 311 (1929)). *Save Our State Park v. Bd. of Clallam Cty. Comm'rs*, 74 Wash. App. 637, 645-46, 875 P.2d 673, 678 (1994).

- In *Save Our State Park v. Bd. of Clallam Cty. Comm'rs*[119], the Court struck down a proposed referendum challenging the decision to rezone certain property.

3. The STW Initiatives Impermissibly Intrude into Administrative Affairs

Administrative matters, and "particularly local administrative

[119] 74 Wn. App. 637, 645, 875 P.2d 673 (Div. 2, 1994)

matters, are not subject to initiative or referendum."[120] "Generally speaking, a local government action is administrative if it furthers (or hinders) a plan the local government or some power superior to it has previously adopted."[121] In analyzing the legislative or administrative nature of an initiative, courts ask "whether the proposition is one to make new law or declare a new policy, or merely to carry out and execute law or policy already in existence."[122]

3.1. The STW Initiatives Would Interfere with Existing Tacoma Utility Water Operations & Management

Tacoma's city council regularly performs both legislative and administrative functions. "Generally speaking, a local government action is administrative if it furthers (or hinders) a plan the local government or some power superior to it has previously adopted."[123]

Port Angeles holds that the decision to add fluoride to a municipal water system is administrative in nature, because it "administer(s) the details of the city's existing water system".

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[120] *Our Water-Our Choice!*, 170 Wn.2d at 8 (initiatives seeking to repeal city council's decision to fluoridate city's water supply were administrative).
[121] *Id.* at 10.
[122] *Id* (quoting *Ruano v. Spellman*, 81 Wn.24 820 (1973) (initiative blocking construction of stadium after county council had approved constructing it and had sold bonds to finance it was administrative)).
[123] *City of Port Angeles v. Our Water-Our Choice!*, 170 Wash. 2d 1, 10, 239 P.3d 589 (2010); *citing Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973).

[124]Washington's Supreme Court has long held that setting water rates for the city's utility also constitutes "administrative" action. [125] Similarly, the City of Tacoma's municipal utility's decision to permit a company to connect to the existing system administers the details of the city's existing water system. Tacoma has operated a municipal water system for one hundred years.[126] The City of Tacoma has a lengthy history of administering the supply of water to commercial, manufacturing and municipal large water volume customers.

Again, the Washington Supreme Court's *Spokane Entrepreneurial Ctr.* opinion fully answers this issue by affirming that an initiative petition cannot impose a "vote of the people" requirement upon individual developments:

> The first provision would require any proposed zoning changes involving large developments to be approved by voters in the neighborhood. The trial court ruled that this provision dealt with administrative matters and was thus outside the scope of the initiative power. We affirm this ruling. The city of Spokane has already adopted processes for zoning and development. This provision would modify those processes for zoning and development decisions, which falls under our description of an administrative matter since it deals with carrying out and

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[124] 170 Wn.2d at 13.
[125] *State ex rel. Haas v. Pomeroy*, 50 Wn.2d 23, 28, 308 P.2d 684 (1957).
[126] *Griffin v. Tacoma*, 49 Wn. 524, 526-7, 95 P. 1107 (1908) ("Under the terms of Ordinance No. 790 the electors of the city [of Tacoma] did hold an election in 1893 to determine, among other things, whether the city should purchase of the Tacoma Light and Water Company its water works and all sources of water supply then owned or operated by said company as part of its water system..").

executing laws or policies already in existence.[127]

Like in *Spokane Entrepreneurial Ctr*, Tacoma already has administrative processes in place to regulate development. STW's local Initiatives would infringe upon Tacoma's existing water service administrative processes through its "water service by ballot" provisions.[128] Here, the local STW Initiatives involve solely administrative matters, not legislative ones, because they seek to regulate Tacoma's water utility management and operations. In this way, the local Initiatives do not announce the "details of 'a new policy or plan,' but instead, "modifies] ... 'a plan already adopted by the legislative body itself, or some power superior to it.'"[129] Therefore, the Washington Supreme Court's holdings in *City of Port Angeles* and *Spokane Entrepreneurial Center* require that this Appeals Court similarly reject STW's local Initiatives.

3.2. The STW Initiatives Improperly Intrude on Administrative Affairs: "Development by Ballot".

The local STW Initiatives' "development by ballot" sections also concern administrative matters and thus, fall outside the scope of

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[127] *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016).
[128] CP 383-4, *Code Initiative at § A* and CP 385-6, *Charter Initiative at § 4.24 A.*
[129] *Our Water-Our Choice!*, 170 Wn.2d at 14 (quoting *Heider v. City of Seattle*, 100 Wn.2d 874, 876 (1984) (referendum blocking change of street name was administrative)).

the local initiative power. ***First***, the STW Initiatives' requirement for a vote for certain water use applications is a backdoor attempt to zone. As such, this section performs administrative, not legislative functions. "Generally, when a municipality adopts a zoning code and comprehensive plan, it acts in a legislative policy-making capacity."[130] "Thus, "[a]mendments of the zoning code or rezones usually are decisions by a municipal body implementing the zoning code and a comprehensive plan." *Id.* In these instances, "[the legislative body essentially is then performing its administrative function." *Id.*

The STW Initiatives do not expressly announce a new zoning code but instead, seeks to amend the City of Tacoma's Charter, or zoning code, or to amend how the City implements that code, by requiring that a majority vote approve water users of more than 1 million gallons of water per day.[131] In this way, the Initiatives are administrative in nature, not legislative, and thus an invalid use of the initiative process. See *Leonard*, 87 Wn.2d at 850 (referendum seeking to rezone property and modify comprehensive plan to reflect anticipated land-use change was administrative).

Second, the STW Initiatives' water rights section also intrudes

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[130] *Leonard*, 87 Wn.2d at 850.
[131] *Code Initiative at § A* and *Charter Initiative at § 4.24 A.*

on administrative matters because they seek to regulate water use that Washington's water law and Growth Management Act govern. Washington's water laws, and the Growth Management Act, as implemented by the Department of Ecology, set the policy for and comprehensively govern water use as a critical resource. The STW Initiatives' water rights section seeks to interfere with these policies and plans. The GMA, for instance, requires local legislative bodies to "adopt development regulations that protect critical areas that are required to be designated" under the Act, which include "areas critical to recharging aquifers used for potable water" and "areas used for fish and wildlife habitat conservation." [132]

The local STW Initiative thus seeks to legislate in areas within the GMA's scope. See *Id.* (referendum regarding ordinances regulating surface water flows and clearing and grading fell within GMA's scope). By creating "fundamental and inalienable rights" in residents, it also "explicitly seek[s] to administer the details" of Tacoma's water system, which the Clean Water Act and Washington's water laws govern".[133] The Washington Supreme Court has repeatedly found that these local Initiative actions

[132] *1000 Friends of Wash.*, 159 Wn.2d at 183.
[133] *See Our Water Our Choice!*, 170 Wn.2d at 13.

impermissibly involve administrative, not legislative, matters.[134]

C. Rules of Statutory Construction Do Not Save or Shield STW's Defective Local Initiatives.[135]

STW fails in its argument that rules of statutory construction apply and save or shield STW's defective local Initiatives. Any presumption of constitutionality was conclusively settled in Respondent's favor by the Washington Supreme Court which addresses the near identical, four substantive prongs of the STW Initiatives in *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016), ("*Spokane*") ("we affirm the trial court's ruling that all four provisions of the Envision Initiative were outside the scope of the local initiative power, as they either dealt with non-legislative matters or were outside the authority of the city.") The Supreme Court's findings in *Spokane* directly apply to and invalidate the four primary provisions of the STW Initiatives as follows:

- STW's "Water development by ballot" zoning[136] compares to *Spokane*: "The first provision would require any proposed zoning changes involving large developments to be approved by

[134] *See Our Water-Our Choice!*, 170 Wn.2d at 13-14 (initiatives attempting to reverse city fluoridation program were administrative); *1000 Friends of Wash.*, 159 Wn.2d at 185 (surface water and clearing and grading initiatives "passed pursuant to GMA's requirement that critical areas be designated and protected ... implement state policy and are not subject to local referenda").
[135] *STW's Opening Brief at 41.*
[136] CP 383-6, *Code Initiative §A & Charter Initiative at § 4.24 A*

voters in the neighborhood. The trial court ruled that this provision dealt with administrative matters and was thus outside the scope of the initiative power. We affirm this ruling. The city of Spokane has already adopted processes for zoning and development. This provision would modify those processes for zoning and development decisions, which falls under our description of an administrative matter since it deals with carrying out and executing laws or policies already in existence. *See Ruano, 81 Wn.2d at 823.*" *Spokane* at 108.

- STW's "Limitation on Government's Infringement of the People's Right of Sustainable Water protection"[137] compares to *Spokane*: "The second provision would give the Spokane River the legal right to "exist and flourish," including the rights to sustainable recharge, sufficient flows to support native fish, and clean water. CP at 40. It would also give Spokane residents the right to access and use water in the city, as well as the right to enforce the Spokane River's new rights. *Id.* The trial court ruled that this provision was outside of the scope of the local initiative power because it conflicted with state law which already determines the water rights for the Spokane River. The trial court noted that this provision was particularly problematic because it dealt with an aquifer that is actually located in Idaho, which is outside of the city's authority. The trial court also ruled that this provision was administrative in nature because it would deal with how an existing regulatory scheme is implemented. We affirm. This broad provision is directly contrary to the water rights system established by the State and is outside the scope of the city's authority. *Spokane* at 109.

- STW's Invalidation of any conflicting Washington and state agency laws and rules"[138] compares to *Spokane*: "The third provision attempts to give employees the protections of the *Bill*

[137] CP 383-6, *Code Initiative § B & Charter Initiative at § 4.24 B.*
[138] CP 383-6, *Code Initiative § B & Charter Initiative at § 4.24 B.*

of Rights against their employer in the workplace. The trial court ruled that this provision was outside of the scope of the local initiative power because (1) municipalities cannot expand constitutional protections and (2) this provision would conflict with state and federal labor laws. We affirm. Expanding the *Bill of Rights* to apply to private persons and entities, not just state actors, is a federal constitutional issue that is outside the scope of local authority. *See Ford v. Logan, 79 Wn.2d 147, 156, 483 P.2d 1247 (1971)* ("Amendment of our constitution is not a legislative act and thus is not within the initiative power reserved to the voters."). *Spokane* at 109.

- STW's non-recognition of "conflicting" of international, federal or state laws, courts and the invalidation of corporation personhood[139] compares to *Spokane*: "The fourth provision would strip the legal rights of any corporation that violated the rights secured in the charter. This appears to be a response to the United States Supreme Court's decision in *Citizens United v. Federal Election Commission,* 558 U.S. 310, 342-43,130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), which held that corporations have rights under the federal constitution. The trial court ruled that this provision was outside of the scope of the local initiative power because it directly conflicts with federal and state law. We affirm this ruling because municipalities cannot strip constitutional rights from entities and cannot undo decisions of the United States Supreme Court"[140]. *Spokane* at 109-10.

  Further, while "Multiple interpretations are resolved in favor of

[139] CP 383-6, *Code Initiative § C and Charter Initiative at § 4.24 C.*

[140] The remaining sections of STW's Initiative are CP 383-6, Enforcement (*Code Initiative § C and Charter Initiative at § 4.24 C*), Severability (*Code Initiative § C and Charter Initiative at § 4.24 C)* and Effect (*Code Initiative § C and Charter Initiative at § 4.24 C).* If the substantive provisions A-C are held invalid, these provisions are moot.

the law's validity,[141]" rules of statutory construction provide that where language is clear, no judicial interpretation is proper.[142] There is nothing ambiguous about STW's local Initiative language. As proof: STW fails in its Opening Brief to point to the Court to any claimed ambiguity and it is too late to do so now.

D. Invalid Local Initiatives Should Not Appear on Ballot.

A frequent refrain by STW is that Respondents seek to curb STW's First Amendment rights by filing this lawsuit. But "[t]here is *no* First Amendment right to place an initiative on the ballot."[143] The initiative sponsors have freely exercised their rights to petition the government and speak (rights, ironically, the sponsors seek to deny to everyone BUT Tacoma residents). They have no right to use the ballot as a forum for political expression. The purpose of the ballot is to elect candidates and enact law -not for political expression. As the U.S. Supreme Court explained in the "Washington Top 2 Primary" case, "[b]allots serve primarily to elect

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[141] *STW Opening Brief* at 41.
[142] If language of a statute is clear, its plain meaning must be given effect without resort to rules of statutory construction. *State v. Theilken,* 102 Wn.2d 271, 275, 684 P.2d 709 (1984). *Murphy v. Department Of Licensing,* 28 Wn. App. 620, 625 P.2d 732 (1981).
[143] *Angle v. Miller, 613*F.3d 1122, 1133 (9th Cir. 2012) (emphasis added) (citing *Meyer v. Grant,*486 U.S. 414, 424 (1988)).

candidates, *not as forums/or political expression."*[144]

Washington law is the same. In *City of Longview v. Wallin*[145], initiative sponsors argued that they had a First Amendment right to have their local initiative appear on the ballot. There, the defendant (like STW) relied on *Coppernoll* to argue a pre-election challenge to the scope of a local initiative violated his free speech rights. 301 P.3d at *59*. The Court rejected the argument that a pre-election challenge infringed on the sponsor's free speech rights and explained there was no constitutional right at issue. The local initiative power derives from statute, **not** the constitution, so "local powers of initiative do not receive the same vigilant protection as the constitutional powers addressed in *Coppernoll* [a statewide initiative case]."[146]

The Court in *Wallin* also concluded that where, as here, "the petition sponsors were permitted to circulate their petition for signatures and to submit that petition to the county auditor *to* have the signatures counted," the sponsors suffered no impairment of their right to political speech.[147] The Court rejected the sponsors' argument that the First Amendment affords initiative sponsors the

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[144] *Wash. Grange v. WA Republican Party,* 552 U.S. 442, 453 n.7 (2008) (emphasis added) (citation and internal quotation marks omitted).
[145] *See City of Longview v. Wallin,* 301 P.3d 45, 53-54 (2013).
[146] *Id.*
[147] 301 P.3d at 60.

"right to have any initiative, regardless of whether it is outside the scope of local initiative power, placed on the ballot."[148] As in *Wallin,* STW supporters do not have any right to have their local initiative appear on the ballot. Including invalid initiatives on the ballot does not vindicate or protect any rights, it undermines the integrity of a system intended to enact laws.

E. The Court Cannot Sever the Offending Sections Without Defeating STW Local Initiatives' Purpose.

The STW Initiatives' severability clauses cannot save them[149]. An "initiative may not be severed ... if the valid and invalid portions are so connected that the valid portions would be 'useless to accomplish the legislative purpose.'"[150] For instance, in *City of Seattle v. Yes for Seattle,* the court invalidated an initiative that sought to enact Growth Management Act development regulations because the "development aspects" of the initiative pervaded its sections, and the "non-development sections on their own would not accomplish the [development and land use control] goals of the initiative." [151]Similarly, here, the Court must invalidate the STW Initiatives in their entirety because they interference with city

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[148] *Id.*
[149]CP 385-6, *Code Initiative at § E.*
[150] *City of Seattle v. Yes for Seattle,* 122 Wn. App. 382, 393 (2004).
[151] *Id* at 394.

administrative functions and overreach of state and federal laws permeate the Initiative. [152] Even if the Court were to sever those provisions, little, if anything, would remain to accomplish the Initiative's goals. Indeed, the Initiative describes its purpose as:

> The People's Right to Water Protection vote provides a demonstrative safeguard, on top of the City's existing application process, to ensure that large new water users do not threaten the sustainability of the people's water supply. To prevent subsequent denial of the People's Right to Water Protection by state law preemption, all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate the rights o mandates of this Article[153].

The STW Initiatives' titles characterize their purpose as primarily concerned with requiring the "people" of Tacoma to control regional water use: "The People's Right to Water Protection".[154] "Given the nature of the Initiatives and ballot titles, the valid portions of the initiative (if any,] are not severable from the invalid portions."[155]

This Appeals Court should uphold the invalidity of both local STW Initiatives because invalidating the offending sections-the

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[152] CP 383-6, *Code & Charter Initiative generally.*
[153] CP 383-6, *Code Initiative at § B & Charter Initiative at § 4.24 B.*
[154] *Id.*
[155] *Yes for Seattle*, 122 Wn. App. at 395.

"development by ballot" zoning,[156] invalidation of any conflicting Washington and state agency laws and rules[157], and non-recognition of "conflicting" of international, federal or state laws, courts and the invalidation of corporation personhood[158] would leave nothing to accomplish the local Initiatives' goal to subordinate the right of unincorporated residents and corporations to those of Tacoma city residents. This theme of "people's" management of water by vote permeates both Initiatives entirely, each section of which purports to confer expanded or new rights for Tacoma residents, while reducing the rights of unincorporated residents and corporations. *See Id.* Thus, severing the invalid portions of the STW local Initiatives would render the Initiative "useless to accomplish the legislative purpose."[159]

IV. CONCLUSION

STW's local Initiatives attempt to repeal or amend the United States and Washington constitutions; create new inalienable and fundamental constitutional rights; interfere with City

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[156] CP 383-6, *Code Initiative §A & Charter Initiative at § 4.24 A.*
[157] CP 383-6, *Code Initiative § B & Charter Initiative at § 4.24 B.*
[158] CP 383-6, *Code Initiative § C and Charter Initiative at § 4.24 C.*
[159] *Yes for Seattle*, 122 Wn. App. at 393. *See also Priorities First v. City of Spokane*, 93 Wn. App. 406, 414 (1998) ("The savings clause does not preserve the remaining portions of the initiative because the severed portion is vital to the intended legislative purpose.").

administrative matters; and usurp authority delegated exclusively to the Tacoma City Council. For all the foregoing reasons, and in specific reliance upon the Supreme Courts holding in *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016), the Trial Court's Orders should remain undisturbed.

DATED 11th day of April 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 11th day of April 2017, at Tacoma, Washington.

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